Nos. 783-784 (31)

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1943.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, a Corporation, Petitioner,
vs.
SAMUEL A. SPERBER, Respondent.

NEW YORK LIFE INSURANCE COMPANY, a Corporation, Petitioner,
vs.
SAMUEL A. SPERBER, Respondent.

PETITION FOR A WRIT OF CERTIORARI
and
SUPPORTING BRIEF AND ARGUMENT.

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THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, a Corporation, Petitioner,

vs.

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NEW YORK LIFE INSURANCE COMPANY, a Corporation, Petitioner,

vs.

SAMUEL A. SPERBER, Respondent.

PETITION FOR A WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The respondent, Samuel A. Sperber, on July 17, 1941, instituted an action against petitioner, The Connecticut Mutual Life Insurance Company, and on August 16, 1941, he instituted another action against petitioner, New York Life Insurance Company, in the Circuit Court of the City of St. Louis, Missouri (R. 3, 26). Both actions were removed on the petitions of the defendants to the United States District Court for the Eastern District of Missouri (R. 15,

37). In these actions respondent sought to recover under the total and permanent disability benefit of a policy of life insurance which provided that if the respondent became totally and permanently disabled as the result of bodily injuries or disease from engaging in any occupation for remuneration or profit, the company would, during the continuance of such disability, pay the respondent the sum of $50 monthly and would also waive the payment of the premiums due under the policy (R. 11, 31). Respondent in his petitions in these actions alleged that he became totally and permanently disabled on July 29, 1933, from injuries sustained in an automobile accident, which necessitated the amputation of his left arm a few days later, and that he was entitled to the sum of $50 per month under each policy from July 29, 1933, together with the premiums which he had paid thereon since that date amounting to $6,219.50 under the Connecticut Mutual policy (R., p. 5) and to $6,577.60 under the New York Life policy (R., p. 28).

Both causes were set for trial in the District Court on the same day, and by agreement of the parties (R. 46) they were consolidated for trial in conformity with Rule 42 (a), Federal Rules of Civil Procedure.

The sole issue at the trial was whether respondent had been totally and permanently disabled from July 29, 1933, to the date of the institution of the actions. That issue was submitted to the jury by the District Court for a special verdict, and the jury, in response to written interrogatories, found that the respondent had not been totally and permanently disabled since July 29, 1933 (R., pp. 369-70), and upon that finding separate judgments were duly rendered by the District Court in favor of the defendant in each action (R., pp. 371-372).

On an appeal by respondent those judgments were reversed by the United States Circuit Court of Appeals for the Eighth Circuit and the causes remanded for a new trial.

The Holding of the Court of Appeals.

The Court of Appeals, treating respondent's exception to the charge of the District Court as the equivalent of a request by respondent for an additional charge, held that the District Court's refusal to give an additional charge to the jury that the respondent in his application for the policy issued by the New York Life Insurance Company had stated and represented that his occupation was that of "hairdresser" and "Owner and operator of hairdressing shop," was prejudicial to respondent, and required a reversal of the judgment in both actions, because the District Court had previously charged the jury that the respondent in his application for the Connecticut Mutual policy had stated that his principal occupation was that of proprietor of the Sperber Hair Shop and that his duties in that occupation were "executive with a small amount of cosmetology."

The Court of Appeals further held that if the principal duties of respondent's occupation when the policies were issued and when he was injured on July 29, 1933, were the manual work of hairdressing, then under the Missouri law the respondent would be totally and permanently disabled by reason of his inability to perform the manual work of hairdressing after the amputation of his left arm, even though he was able to perform the executive, managerial and supervisory duties in connection with the operation of his hairdressing shops.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

I.

The holding of the Court of Appeals that the refusal of the District Court to give an additional charge to the jury with respect to the occupation, and the duties of the occupation, stated by respondent in his application for the New York Life policy was prejudicial to respondent in his action on the policy issued by The Connecticut Mutual Life Insurance Company and required a reversal of the judgment of the District Court in favor of the company in that action, is based upon the erroneous and mistaken assumption that the effect of the consolidation of these actions for trial under Rule 42 (a) F. R. C. P., was to merge or convert into one action what had theretofore been two separate and distinct actions. The consolidation of these actions for trial had no such effect. On the contrary, the actions after their consolidation still retained their separate and distinct entity and their consolidation for trial under Rule 42 (a), F. R. C. P., merely resulted in a joint trial of two separate and distinct actions in order to avoid the expense, delay and inconvenience of two separate trials of those actions.

II.

Respondent's exception to that portion of the charge of the District Court which told the jury what the respondent had said in his application for the Connecticut Mutual policy concerning his occupation, and his duties in such occupation, because it did not also inform the jury what respondent had said in his application for the New York Life policy concerning his occupation, and his duties in such occupation, was not, as is held by the Court of Appeals, the equivalent of a request by respondent for an

additional charge by the District Court concerning respondent's occupation and his duties in such occupation, in his application for the New York Life policy.

Likewise, respondent made no written request for an additional instruction with respect to his occupation and the duties of his occupation in his application for the New York Life policy, as is required by Rule 51, F. R. C. P.

III.

The holding of the Court of Appeals that if the principal duties of respondent's occupation at the time of the issuance of the policies and at the time of the amputation of his left arm were the manual work of hairdressing, then respondent's inability to perform the manual work of hairdressing as the result of the amputation of his left arm rendered him totally and permanently disabled under the Missouri law from engaging in any occupation for remuneration or profit as required by the policies, even though he was able to perform the executive, managerial and supervisory duties of such occupation following the amputation of his left arm, is contrary to and in conflict with the Missouri law.

Wherefore, your petitioners pray that a writ of certiorari be issued by this Court to the United States Circuit Court of Appeals for the Eighth Circuit directing that Court to certify and send to this Court for its review and determination a full and complete transcript of the record and all proceedings in the consolidated cases of Samuel A. Sperber, appellant, v. The Connecticut Mutual Life Insurance Co., a corporation, appellee, No. 12,496, and Samuel A. Sperber, appellant, v. New York Life Insurance Company, a corporation, appellee, No. 12,497, and that the

judgments of the United States Circuit Court of Appeals for the Eighth Circuit in said causes be reversed by this Court.

Respectfully submitted,

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, a Corporation,

and

NEW YORK LIFE INSURANCE COMPANY, a Corporation,

Petitioners,

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